



September 6, 2013

**EX PARTE**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington, D.C. 20554

Re: Universal Service Contribution Methodology, WC Docket No. 06-122

Dear Ms. Dortch:

COMPTEL supports the proposed revisions to the sample reseller certification language and accompanying sections of the FCC Form 499-A instructions submitted by eight telecommunications industry members on July 26, 2013.<sup>1</sup> COMPTEL's support of the revised language is offered without prejudice to its underlying position that the Commission should reconsider its determination that leased special access transmission facilities used by carriers as inputs to broadband Internet access service are subject to universal service contribution and that carriers that incorporate such transmission facilities into non-assessable retail offerings must be treated as end users rather than resellers for reporting purposes.<sup>2</sup> The significance of this determination cannot be overstated. End user revenues are subject to the double digit universal service contribution obligation while resale revenues are not. As a result, carriers that lease wholesale transmission inputs for their retail broadband Internet access services are at a distinct financial disadvantage to carriers that provide Internet access services over their own facilities.

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<sup>1</sup> See July 26, 2013 *ex parte* letter to Marlene Dortch from AT&T Services, Inc., BCE Nexxia, BT Americas, Inc., CenturyLink, Orange Business Services U.S., Inc., Sprint Corporation, Verizon and XO Communications filed in WC Docket No. 06-122.

<sup>2</sup> *In the Matter of AT&T, Inc., CenturyLink, SureWest and Verizon Petition For Clarification, Or In The Alternative, For Partial Reconsideration*, WC Docket No. 06-122, Order, FCC 12-134 (rel. Nov. 5, 2012) ("*Wholesaler/Reseller Clarification Order*").

The Commission was asked almost one year ago to reconsider its decision that carriers that lease transmission inputs for broadband Internet access service should be treated differently for universal service contribution purposes than carriers that provide broadband Internet access service over their own facilities.<sup>3</sup> As COMPTTEL has previously demonstrated to the Commission, there is no defensible technical or policy rationale for the Commission's determination that a carrier's liability for universal service contributions on revenues from the transmission component of Internet access service (or other information services) should vary depending on whether the transmission component is owned or leased and on whether the transmission service is provided on a common carrier or private carriage basis.<sup>4</sup> The Commission's differential treatment of owned and leased facilities for contribution purposes is prohibited by Section 254(d) of the Communications Act<sup>5</sup> because of the real world discriminatory and anticompetitive financial consequences to which it subjects carriers that lease common carrier transmission inputs to provide broadband Internet access services to their end users but does not subject carriers that provide broadband Internet access service over transmission facilities that they own.

The Commission long ago classified wireline broadband Internet access service as an information service not subject to universal service assessment and explicitly concluded that the "transmission component of wireline broadband Internet access service is *not* a telecommunications service."<sup>6</sup> The information service classification applies regardless of whether the Internet access service is provided over the provider's own transmission facilities or, as is true for many competitive carriers, transmission facilities leased from another party.<sup>7</sup> The Commission further determined that neither the statute nor relevant precedent mandates that a

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<sup>3</sup> See U.S. TelePacific's Petition For Partial Reconsideration and Request For Stay filed in WC Docket No. 06-122 on December 5, 2012.

<sup>4</sup> See COMPTTEL's Comments In Support of U.S. TelePacific's Petition For Partial Reconsideration and Request For Stay filed in WC Docket 06-122 January 9, 2013.

<sup>5</sup> 47 U.S.C. §254(d).

<sup>6</sup> *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, 20 FCC Rcd 14853 at ¶4 (2005) ("*Wireline Broadband Order*") (emphasis added).

<sup>7</sup> *Id.* at ¶¶ 14, 16.

broadband transmission service be a telecommunications service when provided to an information service provider.<sup>8</sup>

The Commission has also plainly distinguished broadband transmission services used for basic transmission purposes, which are telecommunications services, from broadband transmission facilities used to provide Internet access services that inextricably intertwine transmission and information processing capabilities, which are not telecommunications services.<sup>9</sup> There is no question that broadband transmission facilities used to provide Internet access services, whether they are leased or self-provisioned,<sup>10</sup> are not used for basic transmission purposes. In order to ensure competitive neutrality, the contribution obligations on broadband transmission facilities must be determined in a manner consistent with the purpose for which those transmission facilities are used, not on ownership of the facilities or the manner in which they are leased. If the transmission services are used to provide telecommunications services, they should be assessable, but if they are used to provide information services, they should not be assessable. So long as the Commission continues to assess universal service fees on telecommunications services, but not on information services, it cannot, consistent with the nondiscrimination mandate of the Act, treat leased broadband transmission inputs differently than owned broadband transmission inputs when they are both used to provide information services.

COMPTEL had hoped that the Commission would resolve these issues before the December 31, 2013 expiration date for wholesalers to rely on reseller certifications consistent with the sample language in the 2012 Form 499-A.<sup>11</sup> Although it has not yet done so, COMPTEL urges the Commission to take this matter up without further delay. In the meantime, COMPTEL submits that the telecommunications providers' proposed language for the revised reseller certification and the accompanying 499-A instructions is consistent with the *Wholesaler/Reseller Clarification Order* and the Commission's Rules but gives wholesalers more flexibility in structuring the content of certifications to meet their particular business circumstances than does the language proposed by the Wireline Competition Bureau.<sup>12</sup> The

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<sup>8</sup> *Id.* at ¶ 103.

<sup>9</sup> *Id.* at ¶ 9.

<sup>10</sup> The identity of the owner of broadband transmission facilities does not affect the nature of the service to the end user. *Id.* at ¶ 16.

<sup>11</sup> *Wholesaler/Reseller Clarification Order* at ¶ 41.

<sup>12</sup> Public Notice, Wireline Competition Bureau Seeks Comment on Proposed Changes To FCC Form 499-A, FCC Form 499-Q and Accompanying Instructions, DA 12-1872 at PN

additional options and flexibility for reseller certifications are preferable to the Bureau's proposed service-by-service certification for both procedural and substantive reasons.

From a procedural standpoint, if the Bureau's proposed language were to be adopted, it would appear as though the Commission had prejudged what it intends to do in the universal service contribution reform rulemaking proceeding without regard to the record that has been developed in that proceeding. Although the Commission explicitly stated in the *Wholesaler/Reseller Clarification Order* that it was not prejudging "what rules the Commission may ultimately adopt in" the rulemaking proceeding,<sup>13</sup> the reseller certification language that the Bureau has proposed for the 2013 Form 499-A Instructions is identical<sup>14</sup> to the language on which the Commission has requested comment in the rulemaking proceeding.<sup>15</sup> The Bureau would be acting precipitously and prematurely if it were to incorporate that language into the Form 499-A Instructions without explicit sign off and explanation by the Commission.

From a substantive standpoint, the language proposed by the telecommunications providers would allow wholesalers to accept reseller certificates on an entity-level, account-level or service-specific level. Allowing wholesalers to select a certification method most compatible with their business plans and operations would be far more economically efficient and administratively manageable than the Bureau's proposed certification language.

Respectfully submitted,

/s/

Mary C. Albert

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Attachment 2, p. 24 (rel. Nov. 23, 2012). The language proposed by the Bureau would require carriers to certify their reseller status for each service purchased.

<sup>13</sup> *Wholesaler-Reseller Clarification Order* at ¶42.

<sup>14</sup> See Public Notice, *Wireline Competition Bureau Seeks Comment On Proposed Changes To FCC Form 499-A, Form 499-Q and Accompanying Instructions*, WC Docket No. 06-122, DA 12-1872 (rel. Nov. 23, 2012) at page 24 of the 2013 Form 499-A Instructions.

<sup>15</sup> *In the Matter of Universal Service Contribution Reform*, WC Docket No. 06-122, Further Notice of Proposed Rulemaking, FCC 12-46, at ¶169 (rel. Apr. 30, 2012).